

CANADA / JUDGMENT

Boisvert et al v. Houston et al

2005 BCSC 38

COURT

Supreme Court of British Columbia

DECIDED

12 January 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2005 BCSC 38err1.doc Boisvert et al v. Houston et al IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Boisvert et al v Houston et al, 2005 BCSC 38 Date: 20050112 Docket: 00/5764 Registry: Victoria Between: William Lamar Boisvert, Janet Boisvert, George Endall and Victor Beland Plaintiffs And: Gordon Houston, HSBC Securities (Canada) Inc. and Larry Mais Defendants Before: Master McCallum Reasons for Decision Counsel for the Plaintiffs James A.S. Legh Tyler T. Luchies Counsel for the Defendant, Gordon Houston Ronald Eichler Date and Place of Hearing: December 14th, 2004 Victoria, B.C.

- [1] The plaintiffs are suing the defendants for damages arising from a failed investment. They maintain that the defendant Gordon Houston ("Houston") misrepresented certain facts about the investment vehicle and that they suffered damages as a result. Houston says, on this application, that the law firm representing the plaintiffs is in a conflict of interest and should be disqualified from acting further for them.
- [2] The issue for determination is whether a law firm can continue to act in circumstances where a lawyer of the firm acted for an opposing party in a potentially related matter. The law firm was not aware of the lawyer's prior involvement for many months after the proceeding was commenced and took no steps to prevent the passage of confidential information until the law firm became aware of the lawyer's prior involvement.
- [3] The plaintiffs allege they purchased shares in Exotika International Concepts Inc. ("Exotika") in the Spring of 1998 on the advice of Houston and that the shares are (and were) of no value. They retained James Legh ("Legh") of Stevenson Luchies & Legh to act for them in prosecuting their claim. Legh filed a writ on their behalf on December 29th, 2000 and a Statement of Claim on December 13th, 2001. Houston filed a Statement of Defence on March 7th, 2002.
- [4] Houston says he consulted John Jordan ("Jordan"), then of McConnan Bion O'Connor & Peterson, during the period from November 1997 to February 1998 with respect to the incorporation and share subscription of Exotika Island Success Holdings Inc. ("Island"). Houston says Island was incorporated specifically for the purpose of holding shares of Exotika in trust for investors. Houston says he discussed his business plan with Jordan and gave confidential information about Exotika to Jordan. He says Jordan knew of his dealings

with at least one of the plaintiffs. Jordan joined the firm of Stevenson Luchies & Legh in February 1999.

- [5] Houston says he asked Jordan to represent him when he was first served with the writ in 2000 and was told by Jordan that Jordan could not act for him because of the possibility of a conflict of interest. Jordan and Legh were by then practicing in the same firm. Houston retained other counsel who learned of Jordan's earlier involvement with Houston when Houston's file at McConnan Bion O'Connor & Peterson was produced in 2004.
- [6] Jordan and Legh say they have never discussed this litigation and will not do so. Legh says this litigation does not involve Island and that his files and records are kept separate from those of Jordan. Jordan has no access to Legh's files or records. Legh says the plaintiffs will be prejudiced if he is not able to act for them given the cost of retaining new counsel at this stage of the proceeding. The matter is not set for trial.
- [7] The leading authority relating to disqualifying conflicts of interest is *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. Sopinka J. described the problem of conflicts of interest at page 1244:
 - 1) The legal profession has historically struggled to maintain the respect of the public. This has been so notwithstanding the high standards that, generally, have been maintained. When the management, size of law firms and many of the practices of the legal profession are indistinguishable from those of business, it is important that the fundamental professional standards be maintained and indeed improved. This is essential if the confidence of the public that the law is a profession is to be preserved and hopefully strengthened. Nothing is more important to the preservation of this relationship than the confidentiality of information passing between a solicitor and his or her client. The legal profession has distinguished itself from other professions by the sanctity with which these communications are treated. The law, too, perhaps unduly, has protected solicitor and client exchanges while denying the same protection to others. This tradition assumes particular importance when a client bares his or her soul in civil or criminal litigation. Clients do this in the justifiable belief that nothing they say will be used against them and to the advantage of the adversary. Loss of this confidence would deliver a serious blow to the integrity of the profession and to the public's confidence in the administration of justice.
- [8] Sopinka J. stated the test at pages 1259 -60: The test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict. Typically, these cases require two questions to be answered:

- (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?
- (2) Is there a risk that it will be used to the prejudice of the client?
- [9] In this case the law firm says Jordan received no confidential information relevant to this action. It says that Jordan's earlier involvement with Houston was unrelated to this litigation. That is not the case. Houston's evidence is unchallenged and establishes clearly that Jordan received confidential information relevant to the matter at hand. Houston says he discussed his plans for attracting investors to the Exotika scheme and that Jordan was specifically aware of the involvement of one of the plaintiffs. On that basis, it is clear that Jordan received confidential information of the disqualifying type.
- [10] There is no suggestion that Jordan has acted directly for the plaintiffs against his former client. Legh has had carriage of the action throughout and he and Jordan swear that no confidential information has been exchanged. The Law Society of British Columbia has rules in place to deal with situations that arise when lawyers transfer from one law firm to another. Although efforts were made by the Stevenson law firm and Jordan to discover possible conflicts there was no disclosure of Jordan's earlier involvement with Houston. The rules are designed to reinforce the public policy and public interest in avoiding not only the misuse of confidential information but the appearance of or the possibility of the misuse of that information. Because the law firm's search did not reveal Jordan's earlier involvement with Houston, the possibility and appearance of impropriety are important factors.
- [11] Sopinka J. summarized the concerns in cases such as this in *MacDonald Estate* at page 1263: A fortiori undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used. In this regard I am in agreement with the statement of Posner J. in *Analytica [Inc. v. NPD Research, Inc.]*, 708, F.2d 1263 (1983), supra, to which I have referred above, that affidavits of lawyers difficult to verify objectively will fail to assure the public. These standards will, in my opinion, strike the appropriate balance among the three interests to which I have referred. In giving precedence to the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and in the administration of justice will be maintained and strengthened. On the other hand, reflecting the interest of a member of the public in retaining counsel of her choice and the interest of the profession in permitting lawyers to move from one firm to another, the standards are sufficiently flexible to permit a solicitor to act against a former client provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.

- [12] The issue in the case at bar turns on whether a reasonable member of the public in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur. The affidavits of the lawyers, as set out in MacDonald Estate, will not reassure the public. The passage of time before the conflict was discovered would undoubtedly leave a reasonable member of the public with a lingering doubt as to what use might have been made of the confidential information possessed by Jordan. The defendants may have more than a lingering doubt and should not be left in that position unless the prejudice to the plaintiffs is particularly acute.
- [13] There is no evidence that the plaintiffs will be prejudiced unduly. I accept that obtaining new counsel will involve a delay but the matter is not set for trial and the plaintiffs will not lose the benefit of the efforts on their behalf by Legh. The case appears to be one that can be conducted appropriately by any of the many other competent counsel available in Victoria although I do not lightly dismiss the value the plaintiffs may place on retaining counsel of their choice. This is a case where the interests of justice and the integrity of the legal profession require that Legh be disqualified from acting for the plaintiffs.
- [14] Legh was alerted to the possibility of the conflict in July 2004. He invited this application in his response to Houston's counsel on September 20th, 2004 declining to withdraw from participation in the litigation. Houston was successful in his motion and is entitled to his costs. Houston asked for costs to be paid personally by Legh but there is no reasonable basis to make that order. Costs of the application will go to Houston on Scale 3 payable by the plaintiffs in any event of the cause. "Master William McCallum" January 13, 2005 - Revised Judgment In all instances where the Defendant is referred to as Gordon Huston, the judgment should read "Gordon Houston". Counsel for the Plaintiffs should read "James A.S. Legh and Tyler T. Luchies" rather than John Jordan.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/05/00/2005bcsc0038err1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/boisvert-et-al-v-houston-et-al-2005>

Prepared on 29 October 2026 · Esheria